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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KAREN DAVENPORT,

Plaintiff and Appellant,

v.

INTERACTIVE COMMUNICATIONS  
INTERNATIONAL, INC.,

Defendant and Respondent.

D054992

(Super. Ct. No. 37-2007-00053762-  
CU-BT-NC)

APPEAL from an order of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

Karen Davenport appeals from an order denying a motion to certify a class of California residents who purchased a reloadable prepaid Visa card sold by Interactive Communications International, Inc. (InComm). As we explain, we conclude the trial court properly ruled the action was not suitable for class treatment, and thus affirm the order.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. The Fastcard Prepaid Visa Card*

The Fastcard Prepaid Visa card (Fastcard) sold by InComm differs from a standard Visa gift card because the Fastcard is "reloadable," meaning its holder can add new value to the card, and because the holder can use the Fastcard to obtain cash from a bank. Because of these distinguishing features, InComm alleges it is required to comply with federal law (the Bank Secrecy Act's anti-money laundering provisions). Thus, when a consumer purchases a Fastcard, the consumer is required to complete a registration form and provide InComm with true, accurate and personal identifying information. Before issuing a personalized Fastcard, InComm further alleges it is required under federal law to verify the information provided by the consumer, a process that typically takes between seven and 14 days.

During the verification process, consumers can use an instant-issue, low denomination, non-reloadable ATM card included in the Fastcard package. The ATM card is activated at the point of purchase. The ATM card also is "anonymous," meaning that no specific consumer is associated with it.

As set forth in the cardholder agreement accompanying the Fastcard,<sup>1</sup> a consumer denied a Fastcard has the option of using the ATM card for 60 days from the time of

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<sup>1</sup> The terms and conditions of the Fastcard, including the fees associated with certain uses, are disclosed in this cardholder agreement included in the inside packaging of the Fastcard.

activation to deplete the stored value on the card. Alternatively, a consumer can elect to liquidate the ATM card and obtain from InComm a refund of the stored value of the card. A consumer who liquidates the ATM card within 30 days of activation is not charged any liquidation fee. When a consumer is issued a Fastcard, the ATM card no longer has any stored value.

Printed at the bottom of the front of the Fastcard package, in a font that is smaller than some of the other printing on the front of the package, is the following disclosure: "Visa Card not enclosed. ATM Card provided for use until Visa Card is received." The front package also discloses: "\$9.95 Activation Fee at time of purchase"; "No value until activated at register and funds loaded on card"; "Shop online or pay bills \* It's prepaid, so no interest charges"; "Great for students \* No credit check, No gimmicks, No Hassle."

The back of the Fastcard package sets forth the steps a consumer must take to obtain the Fastcard:

"1. Activate your Prepaid ATM Card[.] Visit the website at [www.myfastcard.com](http://www.myfastcard.com) or call 1-800-486-8394 to complete activation of your ATM Card.

"2. Choose your custom Prepaid Visa Card[.] Go online to [www.myfastcard.com](http://www.myfastcard.com) or call 1-800-486-8394 to order your custom-designed Prepaid Visa Card.

"3. Use your ATM Card now! Use your new ATM Card at ATM's everywhere while waiting for your personalized and Prepaid Visa Card.

"4. How to add value to your Card[.] Visit a participating Fastcard retail location and present your Card along with funds to be loaded on the Card to the cashier."

*B. Davenport Purchases a Fastcard*

Davenport in 2006 purchased a \$50 Fastcard for her son from a Longs drug store located in Encinitas, California. Davenport noticed the Fastcard hanging on a display, saw the picture of the Visa logo on the front of the package and purchased the Fastcard with the assumption that she could load the card with money for immediate use as a prepaid credit card. Davenport assumed a prepaid Visa card was enclosed in the packaging because that was what she was "accustomed to" when purchasing other prepaid Visa card products. Davenport did not see the disclaimer on the front of Fastcard package stating that no Visa card was enclosed.

Davenport opened the Fastcard package in the parking lot outside the store and discovered that an ATM card was enclosed but not a Visa credit card. Davenport called the 1-800 number on the packaging and spoke to a customer service representative who explained that she had to register for the prepaid Visa card and wait a few weeks for the card to arrive. Davenport asked the service representative for a refund but claims she was told there were no refunds. Davenport next attempted to return the Fastcard to Longs, but claims she also was told by the sales clerk and manager that no refunds were available.

Dissatisfied, later that same day Davenport went to a bank and withdrew as much money as possible from the prepaid ATM card. Davenport gave the money to her son so he would have cash "in his pocket" for a trip. She could not recall whether she had money in her wallet or in her own bank account that she could have given her son in lieu

of withdrawing money from the prepaid ATM card. Davenport never registered to receive the prepaid Visa card.

Davenport knew before she used the prepaid ATM card that fees would be assessed for cash withdrawals because the customer service representative had informed Davenport of such during their telephone conversation about the procedures for use of the ATM card. Davenport did not open the written disclosures included inside the Fastcard package until a few days before her deposition. However, the written disclosures also provided that fees would be assessed for, among other things, ATM withdrawals and that cardholders had up to 30 days to liquidate the ATM card without incurring a liquidation fee.

### *C. Davenport's Class Action Lawsuit*

Davenport, represented by her employer, business partner and "good personal friend," filed a consumer class action lawsuit against InComm. The operative complaint asserted three causes of action: (1) violation of unfair competition laws (Bus. & Prof. Code § 17200 et seq.); (2) fraud; and (3) negligent misrepresentation.

Each cause of action generally alleged that the Fastcard packaging falsely represented that a Visa card was enclosed for immediate use when in fact the Fastcard only included an ATM card, and that the fees associated with the card were limited to the \$9.95 activation fee, when in fact cardholders had to pay not only the activation fee, but also: a \$3.95 monthly ATM card maintenance fee; a \$2.00 ATM withdrawal fee; a \$0.75 pin purchase fee; and a \$10.00 ATM liquidation fee if the ATM card was liquidated more than 30 days after purchase. Davenport on behalf of herself, all others similarly situated

and the public sought compensatory and punitive damages, restitution and injunctive relief.

Davenport subsequently moved under Code of Civil Procedure section 382 to certify the following class:

"All California residents who have purchased a Fastcard Prepaid Visa Card from any retail location, including, but not limited to any Longs Drug Store location in California since January 1, 2005, at any time that [InComm] was using the packaging as shown in Exhibit 1 attached to [Davenport's] complaint ("the class"). Excluded from the class definition are defendants, individuals who are directors, officers and employees of the defendant corporations, or their affiliates and the immediate family members thereof."

*D. Denial of Class Certification*

The trial court denied Davenport's motion for class certification, ruling as follows: "Two requirements must be satisfied in order to certify a class action: 'The first is existence of an ascertainable class and the second is a well-defined community of interest in the questions of law and fact involved.' (Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809[.])

"Whether a class is ascertainable 'is determined by examining (1) the class definition; (2) the size of the class; and (3) the means available for identifying the class members.' (Reyes v. San Diego County Board of Supervisors (1987) 196 Cal.App.3d 1263[.])

"Plaintiff has not met her burden of showing the class is 'ascertainable' in that the class definition is vague and overbroad and does not convey sufficient meaning 'to enable

persons hearing it to determine whether they are members of the class plaintiffs wish to represent.' (Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836[.]) The class definition . . . encompasses all persons who purchased a Fastcard Prepaid Visa Card since Jan. 1, 2005 with the packaging attached to Plaintiff's complaint. This definition is overbroad in that it encompasses all consumers who purchased the card, even those who had not been injured as alleged in Plaintiff's complaint because they never incurred any ATM fees, they read the disclosure on the packaging that reveals that no Visa was enclosed, or they do not contend they were misled by the packaging.

"In addition, part of the 'community of interest' requirement is that Plaintiff must show her claims are typical of the class. (Lockheed Martin Corp. v. Superior Court (2003) 29 Cal.4th 1096[.]) Here, the basis for Plaintiff's belief that the Visa card was enclosed in the package she purchased is her failure to read the front of the package disclosing that no card was enclosed and her own personal experience with similar cards in the past. (See Plaintiff's second amended complaint and Plaintiff's deposition, pages 40-42, 45, and 122[.]) Her claim is not typical of class members who read the package, knew no Visa was enclosed and did not expect a Visa would be enclosed due to any past experience. Thus, Plaintiff has failed to show that she is situated similarly to other class members. (See Caro v. Proctor & Gamble Co. (1993) 18 Cal.App.4th 644, 664[.])

"Plaintiff also must assert all claims reasonably expected to be asserted by the class members. (City of San Jose v. Superior Court (1974) 12 Cal.3d 447[.]) Here, Plaintiff did not activate the Visa card and thus cannot assert a claim based on damages suffered by having to pay the maintenance fee. Other class members may wish to assert

that claim. Because Plaintiff cannot do so and because any judgment in this case would bar further relief to class members, her claims are not typical and she is not an adequate representative. (*Id.*)

"Another part of the 'community of interest' requirement is that Plaintiff show she can adequately represent the class. (Lockheed Martin Corp., supra[.]) Where class counsel and a class representative have 'significant personal and financial ties[,] there is both a present and potential conflict of interest justifying denial of class certification. (London v. Wal-Mart Stores, Inc. (11th Cir. 2003) 34 F.3d 1246, 1255[.])

"Here, the evidence shows Plaintiff and Plaintiff's counsel, Mr. Geraci, are business associates. Geraci is Plaintiff's employer, and they are close friends. (See Plaintiff's deposition pages 82-87 and 92-93[.]) This evidence is sufficient to demonstrate Plaintiff cannot adequately represent the class and thus class certification should be denied.

"Lastly, a class action is not 'superior' where there are numerous and substantial questions affecting each class members' right to recover and maintenance of a class action would not be advantageous to the judicial process and the litigants. (Lockheed Martin, supra[.])

"Plaintiff seeks class certification of this action involving a claim under [Business & Professions] Code [section] 17200 and two fraud-based causes of action. In the fraud-based causes of action, a misrepresentation's materiality and whether each member justifiably relied thereon may vary with each class member. As a result, in these types of claims, individual issues usually predominate over any common issues. (Caro, supra[.])



"Here, each class member would be required to present evidence that he or she failed to read the outside package disclosure indicating no Visa card was enclosed, and would need to show that they assumed the card was enclosed due to their past dealings with similar cards, and they bought the card based on those representations and assumptions. In addition, each one would have to show they somehow relied on the statements in the inside of the package after they purchased the card, and each would have to show they believed their fees would not exceed the \$9.95 activation charge and purchased the card in reliance on that belief.

"There [also] would need to be individualized inquiries into whether or not the class members in fact suffered damages, i.e., the Court would need to determine whether the members activated the Visa card thus incurring maintenance fees, whether each member instead of or in addition to using the Visa, used the ATM card or whether the members liquidated the ATM card before incurring any fees, etc.

"As Plaintiff bears the burden of establishing the existence of an ascertainable class and a well-defined community of interest among the class members and sufficient grounds for a class action, pursuant to the above ruling, the instant motion is denied."

## DISCUSSION

### *A. Overview of Law and Standard of Review*

Class certification is governed by Code of Civil Procedure section 382, which provides in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue . . . for the benefit of all." Code of Civil Procedure

section 382 authorizes a class action when a plaintiff meets his or her burden to establish the existence of a well-defined community of interest among an ascertainable class.

(*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1103-1104.)

"The certification question is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious.' [Citation.] A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326; *Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829 ["At a class certification hearing, the court should not make any determination of the merits or validity of the claim."])

"We review the trial court's ruling for abuse of discretion. 'Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. . . . [Accordingly,] a trial court ruling supported by substantial evidence generally will not be disturbed "unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]" [citation]. . . . "Any valid pertinent reason stated will be sufficient to uphold the order." ' [Citations.]" (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at pp. 326-327; *Kaldenbach v. Mutual of Omaha Life Ins. Co.* (2009) 178 Cal.App.4th 830, 844 ["We may not reverse, however, simply because *some* of the court's

reasoning was faulty, so long as *any* of the stated reasons are sufficient to justify the order."]) When a certification order turns on disputed facts or inferences to be drawn from the facts, " ' ' 'the reviewing court has no authority to substitute its decision for that of the trial court.' " ' ' ' (Sav-On Drug Stores, Inc. v. Superior Court, *supra*, 34 Cal.4th at p. 328.)

#### B. *Community of Interest*

The "community of interest" requirement embodies three elements: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. [Citation.]" (Sav-On Drug Stores, Inc. v. Superior Court, *supra*, 34 Cal.4th at p. 326.) "When the trial court determines the propriety of class action treatment, 'the issue of community of interest is determined on the merits and the plaintiff must establish the community as a matter of fact.' [Citation.]" (Caro v. Proctor & Gamble Co. (1991) 18 Cal.App.4th 644, 662-663.) " '[T]he crucial inquiry centers upon whether the plaintiffs are truly representative of the absent, unnamed class members.' [Citation.]" (*Id.* at p. 663.)

As we have noted, the operative complaint alleged the Fastcard packaging misrepresented that a Visa card was inside when in fact the package contained only an ATM card and that the \$9.95 activation fee was the *only* fee required to use either the ATM or Visa card when in fact there allegedly were multiple "hidden" fees associated with the cards.

However, the evidence in the record shows that Davenport's injuries stemmed from her own failure to read the front of the package disclosing that no Visa card was in fact enclosed. The record also shows that Davenport assumed a prepaid Visa credit card was enclosed in the Fastcard packaging based in part on her experience with similar cards. Davenport testified at her deposition that it was possible those other cards were actually *gift* cards, inasmuch as she testified that she could not recall ever having to register such cards or receiving a statement or invoice itemizing the monthly activity from the use of such cards, and that once the funds on such cards were depleted she merely disposed of them.

Thus, there is substantial evidence in the record to support the trial court's determination that Davenport's alleged injuries in connection with her purchase of the Fastcard are not typical as they are based on circumstances unique to her, and not representative of the claims of the class as a whole. (See *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502 [recognizing that typicality turns on " 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct,' " and affirming denial of class certification for lack of typicality because the two class representatives were vulnerable to unique defenses that would likely become the focus of the litigation]; see also *Caro v. Proctor & Gamble Co.*, *supra*, 18 Cal.App.4th at pp. 664 [affirming denial of class certification on basis class representative's claims were not typical of those of the putative class because the representative was not misled in the same manner as the class was allegedly deceived in

connection with whether orange juice was "fresh," as stated on the orange juice carton, inasmuch as the class representative did not read the entire orange juice label that provided the juice was "from concentrate" and the representative admitted during deposition that he did not expect the orange juice to be "fresh" squeezed juice, but rather "premium" orange juice (e.g., containing both pasteurized and fresh orange juice)].)

Although our conclusion that Davenport's claims were not typical or representative of the claims of the putative class is sufficient to resolve Davenport's appeal, the trial court also determined that a class action would not be beneficial here because there are numerous and substantial questions affecting each class members' right to recover for the alleged fraudulent and/or unlawful conduct of InComm in connection with the Fastcard and its packaging. (See *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 459 [recognizing that a "class action cannot be maintained where each member's right to recover depends on facts peculiar to his or her case," and stating this "rule exists because the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his [or her] right to recover following the 'class judgment' determining issues common to the purported class"].)

Here, the trial court found there would need to be *individualized* inquiries into whether the putative class members activated the Visa card (unlike Davenport), waited the one or two weeks to receive it and incurred fees, if any, in connection with its use; whether class members used the prepaid ATM card inside the Fastcard packaging either in lieu of the Visa card (like Davenport) or while waiting to receive their Visa credit card,

and incurred various fees in connection with its use; or whether the class members chose to liquidate the ATM card (unlike Davenport) and if so, whether they did so within 30 days after purchase, in which case there was no liquidation fee, or waited 30 days or longer and paid the \$10 liquidation fee.

On this record, we conclude there is substantial evidence in the record to support the trial court's determination that a class action would not be beneficial because there are numerous and substantial questions affecting each class members' rights to recover as a member of the putative class. (See *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 912 [" 'Applicable precedents indicate that in observing the ascertainable class requirement they are at the same time giving recognition to the principle that a group of individuals' rights to recover, each of which is based on a separate set of facts, cannot be determined by a judgment in a class action.' [Citation.]"])

### *C. Ascertainable Class*

The trial court also found Davenport failed to satisfy her burden to establish an ascertainable class. "In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members." (*Bufile v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1207.)

As noted *ante*, the trial court found the putative class was not ascertainable because the class definition was vague and overbroad. Specifically, the court found the putative class encompassed "all consumers who purchased the card, even those who had not been injured . . . because [such consumers] never incurred any ATM fees, they read

the disclosure on the packaging that reveals that no Visa was enclosed, or they do not contend they were misled by the packaging."

Initially, we note there is substantial evidence in the record to support the trial court's finding the class definition was overbroad because the definition included purchasers of the Fastcard who were not injured because they in fact read the outside of the packaging which disclosed there was no prepaid Visa card inside. (See *Global Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 858 [Ascertainability " 'goes to the heart of the question of class certification, which requires a class definition that is "precise, objective and presently ascertainable" ' "].)

Davenport, however, argues the trial court "misunderstood" her case with respect to damages because "every person who purchased the [Fastcard] with the packaging at issue was damaged[] because [each person] paid a \$9.95 activation fee for a card that could not be used by simply paying this fee, despite the representations contained on the packaging that this was the *only* fee they would incur to use the card as either an [ATM] card or a Visa. Thus with regard to ascertainability, the class members include all purchasers of the card whether or not they actually activated the card, or actually incurred the additional fees." (Italics added.)

We note the evidence in the record does not support Davenport's claim that *every* purchaser of the Fastcard was injured because the packaging allegedly disclosed that the *only* fee associated with either the ATM or Visa card was the \$9.95 activation fee. The Fastcard packaging instead provides, "\$9.95 Activation Fee at time of purchase." This

representation is insufficient to support the conclusion that this was the *only* fee a purchaser would incur in connection with either the Visa or ATM card.

In any event, to the extent Davenport is correct in arguing that *some* class members may have interpreted the \$9.95 activation fee to be the *only* fee associated with the Visa or ATM card, the trial court did not err in concluding that the class definition was overbroad. The evidence in the record shows that the class definition included repeat users of the Fastcard who would have known there were other fees associated with the use of the card, as set forth in the disclosure statement inside the Fastcard package.

Indeed, Davenport's counsel conceded at oral argument on the certification motion that such repeat users of the card may not qualify as members of the class:

"THE COURT: But what if someone had purchased this item before? So they knew what the fees were. So those wouldn't be undisclosed fees, would they?

"[Davenport's Counsel]: Well, under that circumstance, your honor, that particular person may not qualify for this class."

We thus conclude the trial court did not error in finding the definition of the class overbroad and thus unascertainable. (See *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704-705; cf *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 [concluding class of homeowners in specified developments where a polypropylene product was used in lieu of welded wire mesh in the homes' foundations satisfied ascertainable requirement because *each* homeowner identified in the class had the *same*,



allegedly defective concrete slab].) For this separate and independent reason, the trial court did not err in denying Davenport's motion for class certification.<sup>2</sup>

#### DISPOSITION

The order denying class certification is affirmed. InComm to recover its costs on appeal.

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BENKE, Acting P. J.

WE CONCUR:

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HUFFMAN, J.

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O'ROURKE, J.

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<sup>2</sup> In light of our decision, it is unnecessary to decide the other grounds relied on by the trial court for denial of class certification, including whether there was a conflict between Davenport and her counsel because counsel and Davenport are close friends and involved in business together.